

REPORT DOCUMENTATION PAGE				<i>Form Approved</i> OMB No. 0704-0188	
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing this collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.					
1. REPORT DATE (DD-MM-YYYY) 27-10-2010		2. REPORT TYPE FINAL		3. DATES COVERED (From - To)	
4. TITLE AND SUBTITLE Rule of Law and Detention Operations in the Counterinsurgency Campaign				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) COL Daniel R. Walrath, USA Paper Advisor: CDR Paul Matthews, USN				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Joint Military Operations Department Naval War College 686 Cushing Road Newport, RI 02841-1207				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION / AVAILABILITY STATEMENT Distribution Statement A: Approved for public release; distribution is unlimited.					
13. SUPPLEMENTARY NOTES A paper submitted to the Naval War College faculty in partial satisfaction of the requirements of the Joint Military Operations Department. The contents of this paper reflect my own personal views and are not necessarily endorsed by the NWC or the Department of the Navy.					
14. ABSTRACT <i>Rule of Law and Detention Operations in the Counterinsurgency Campaign.</i> Counterinsurgency theory and doctrine both call for a host government's development of rule of law standards and institutions as a desired and necessary objective in a counterinsurgency campaign to reinforce the government's credibility with the population. However, analysis of rule of law with each of the generic logical lines of operation of a counterinsurgency campaign reveals a tension on when the counterinsurgent should transition from law of war to rule of law standards. Doctrine does not adequately address this tension, but further analysis reveals that ideally the counterinsurgent initially pursues security and support of the population by detaining and incarcerating a high number of suspected insurgents. To achieve the greatest effect with these initial security operations, the counterinsurgent should employ the lower legal thresholds allowed by law of war standards to detain and incarcerate. Only once the counterinsurgent achieves a certain level of popular support should he then transition to the higher legal thresholds associated with rule of law standards. The analysis concludes that the counterinsurgent's timing of this transition is a key part of his campaign planning, recommends certain policies to pursue with respect to detention operations and further recommends additional analysis and assessment of the current counterinsurgency campaign effort in Afghanistan.					
15. SUBJECT TERMS Counterinsurgency, rule of law, law of war, detainees					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 22	19a. NAME OF RESPONSIBLE PERSON Chairman, JMO Dept
a. REPORT UNCLASSIFIED	b. ABSTRACT UNCLASSIFIED	c. THIS PAGE UNCLASSIFIED			19b. TELEPHONE NUMBER (include area code) 401-841-3556

**NAVAL WAR COLLEGE
Newport, Rhode Island**

Rule of Law and Detention Operations in the Counterinsurgency Campaign

by

Daniel R. Walrath

Colonel, United States Army

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

All footnotes appear in shortened form. For full details, see the appropriate entry in the bibliography.

Signature: _____

27 October, 2010

Contents

Introduction	1
Rule of Law versus Law of War	2
Rule of Law as an Objective	4
Analysis of Counterinsurgency Logical Lines of Operation	5
Security and Detainees	8
Timing	13
Risk	14
Conclusion and Recommendations	16
Bibliography	18

Abstract

Rule of Law and Detention Operations in the Counterinsurgency Campaign.

Counterinsurgency theory and doctrine both call for a host government's development of rule of law standards and institutions as a desired and necessary objective in a counterinsurgency campaign to reinforce the government's credibility with the population. However, analysis of rule of law with each of the generic logical lines of operation of a counterinsurgency campaign reveals a tension on when the counterinsurgent should transition from law of war to rule of law standards. Doctrine does not adequately address this tension, but further analysis reveals that ideally the counterinsurgent initially pursues security and support of the population by detaining and incarcerating a high number of suspected insurgents. To achieve the greatest effect with these initial security operations, the counterinsurgent should employ the lower legal thresholds allowed by law of war standards to detain and incarcerate. Only once the counterinsurgent achieves a certain level of popular support should he then transition to the higher legal thresholds associated with rule of law standards. The analysis concludes that the counterinsurgent's timing of this transition is a key part of his campaign planning, recommends certain policies to pursue with respect to detention operations and further recommends additional analysis and assessment of the current counterinsurgency campaign effort in Afghanistan.

INTRODUCTION

Given the United States' involvement in counterinsurgency (COIN) operations in both Iraq and Afghanistan in the beginning of the 21st Century, prudent military commanders and planners would want to understand the development of a successful COIN campaign plan. Counterinsurgency theory and doctrine establish the development of an effective government that is accepted as legitimate in the eyes of the host nation populace as the counterinsurgent's primary goal.¹ To achieve this endstate, Army and Marine Corps doctrine suggest the development of a campaign plan using logical lines of operation that may possibly include²:

- Conduct information operations.
- Conduct combat operations/civil security operations.
- Train and employ HN security forces.
- Establish or restore essential services.
- Support development of better governance.
- Support economic development.

In conjunction with these logical lines of operation the counterinsurgent force also strives for a parallel development of the rule of law. A government's adherence to accepted rules of conduct – the essence of rule of law - in turn increases its overall credibility with the population³. But if a government's development of rule of law reinforces its legitimacy with its governed population, rule of law can also impede security operations and the establishment of a secure environment to protect the same populace. A counterinsurgent's necessary adoption and imposition of rule of law in a COIN campaign can therefore create a tension between a campaign's security line of operation and the legal legitimacy that all other lines of operation are attempting to achieve.

¹ U. S. Office of the CJCS, *Counterinsurgency Operations*, JP 3-24, III-11 - III-13.

² U. S. Army, *Counterinsurgency*, FM 3-24, 4-4 – 4-5.

³ Ibid., 1-22.

One of the many questions for the commander or planner of a counterinsurgent campaign then becomes how to resolve this friction created by the requirement for rule of law? Some historic examples such as the French loss of legitimacy in their COIN campaign in Algeria due to a policy of torture and indiscriminate reprisals argue for adherence to rule of law as a top priority.⁴ Joint doctrine is silent on the issue and its resolution. But counterinsurgency theory and other examples of successful COIN campaigns in Malaysia and Iraq show that the counterinsurgent can resolve this friction by controlling the timing of a host nation government's transition to rule of law standards and institutions. The counterinsurgent should seek to fully transition to rule of law standards, specifically with respect to detention operations, only after first achieving a sufficient level of security and protection of the population.

RULE of LAW versus LAW of WAR

If development of rule of law is a desired objective in a COIN campaign, it is first important to understand a general definition of rule of law as it applies to a COIN campaign. Rule of law implies a government that adheres to and enforces an accepted set of rules that the government has previously established through a legitimate process. Government instruments and institutions such as a legal code, a police force, an independent judiciary and a prison system implement or embody rule of law.⁵ There is no absolute definition or body of recognized rule of law standards, though in general principle rule of law may include requirements for probable cause for search, seizure and arrest, due process and right to a speedy trial. The specific rules and institutions of law will vary by country and culture.

⁴ Campbell, "French Algeria and British Northern Ireland: Legitimacy and the Rule of Law in Low-Intensity Conflict," 5.

⁵ U. S. Army, *Counterinsurgency*, FM 3-24, 1-23 – 1-24.

Rules of law contrast with laws of war (jus in bello versus jus ad bellum). The former is normally associated with peace-time activities and prosecution of criminal violations of prescribed rules while the latter is associated with governing armed conflict between combatants. Laws of armed conflict are embodied in various international agreements and protocols such as the Geneva Convention and govern or stipulate acceptable activities between opposing forces engaged in armed combat⁶

More important than the absolute definitions is the comparison of laws of war relative to rules of law. In broad terms law of war standards afford more authorities to combatant forces and less rights and protections to non-combatants relative to rule of law standards. Laws of war in effect suspend certain rules of law in favor of military necessity, and detention operations in a COIN campaign provide one of the clearest manifestations of these differences in standards. Under law of war standards counterinsurgent general purpose forces may be permitted to detain and incarcerate suspected insurgent militants, operatives and sympathizers based primarily on battlefield intelligence that indicates a threat to security. The counterinsurgent may further establish mere sympathy with or facilitation of the insurgent cause as a threat to security without requiring direct involvement in actual violence – a fairly low threshold. Continued incarceration may only require a military commission review of the intelligence with no opportunity for legal representation or defense of the suspected insurgent. In Iraq prior to 2009 a magistrate cell conducted an initial review of each detainee's case upon arrival at the U.S. detention facility, then a subsequent review was not conducted for another 18 months.⁷ Under a rule of law construct, detention of the same suspected insurgent militant or operative may instead require an arrest warrant issued from a

⁶ *Encyclopædia Britannica Online*, s.v. "jus-in-bello," <http://www.britannica.com/EBchecked/topic/1027369/jus-in-bello> (accessed 17 October 2010).

⁷ Pincus, "U.S. Holds 18,000 Detainees in Iraq," *The Washington Post*.

judge based on probable cause of conduct of violence or violation of a law. The counterinsurgent force may then not be able to detain suspects independently without some level of involvement by host nation police forces. Continued incarceration of suspects may now require due process of judicial hearings, legal representation and rules of evidence – a much higher threshold.

RULE of LAW as an OBJECTIVE

As initially referenced, COIN theory and doctrine both call for the development of rule of law as a desired objective in a COIN fight. David Galula, the well-known French theorist and practitioner of COIN warfare, acknowledges the need for political action and reforms to delegitimize the insurgent.⁸ Both joint doctrine and U. S. Army and Marine Corps doctrine more specifically cite the requirement to pursue rule of law as a ~~major~~ factor in assuring voluntary acceptance of a government's authority and therefore its legitimacy.^{9,10} During the Malayan Emergency from 1948 – 1960, as part of their successful COIN response, the British administration and Government of Malaya maintained a reputation for fair and consistent adherence to a set of special laws effected by the Malayan legislature. The British counterinsurgent administration never suspended Malayan legal institutions further enhancing the legitimacy of the government in the eyes of the Malayan populace.¹¹ Rule of law is also a stated objective of the International Security Assistance Force's current COIN campaign in Afghanistan. The U. S. Government Integrated Civilian – Military Campaign Plan for Support to Afghanistan lists eleven transformative effects necessary to achieve its overall strategic goal; one of these desired effects is ~~Afghan~~ access to fair, efficient and

⁸ Galula, *Counterinsurgency Warfare*, 72.

⁹ U. S. Office of the CJCS, *Counterinsurgency Operations*, JP 3-24, III-13.

¹⁰ U. S. Army, *Counterinsurgency*, FM 3-24, 1-22.

¹¹ Komer, *The Malayan Emergency in Retrospect*, 34.

transparent justice in both state and traditional justice mechanisms” and a main effort to ~~improve~~ capacity of the justice continuum from police to defense attorney, prosecutor, judge and prison in key centers”.¹²

Rule of law then is a necessary objective for a successful COIN campaign, but where does rule of law fit in priority with other objectives? The counterinsurgent commander or administrator must also look at other logical lines of operation in the COIN campaign and determine each of their relationships with the rule of law objective. Logical lines of operation are intertwined – activities and effects along one line of operation should mutually support and reinforce activities along another.¹³ How does rule of law support or detract from these other lines of operation? Determining the answer to this question in concept can guide the counterinsurgent leader in determining the preferred timing for transition to rule of law.

ANALYSIS of COIN LOGICAL LINES of OPERATION

An initial analysis of a COIN campaign’s generic logical lines of operation reveals that rule of law is a positively reinforcing element. First, rule of law most clearly supports the governance line of operation. Government execution of some of its most basic functions and activities, such as taxation, administration of justice, distribution of services, control of property and control of security forces, requires the existence of a body of laws, rules and regulations. The government must have the means and process to establish these laws (usually a legislative or parliamentary function) and must also have the means to consistently and fairly enforce these rules (usually with a trained non-corrupt police force). The populace must voluntarily accept these rules and also have avenues and means to petition its

¹² U.S. Embassy-Kabul and U.S. Forces-Afghanistan, "United States Government Integrated Civilian-Military Campaign Plan for Support to Afghanistan," 7.

¹³ U. S. Army, *Counterinsurgency*, FM 3-24, 5-5.

government for redress of wrongdoings.¹⁴ Within the Afghanistan campaign plan two of the eleven desired transformative effects are governance related: 1) expansion of accountable and transparent government and 2) elections and continuity of governance. Several of the priority objectives that support these two desired effects include rule of law components such as transparent public finance, identification and prosecution of corruption and conduct of legitimate elections.¹⁵ As previously discussed in the Malayan Emergency from 1948-1960, the Government of Malaya maintained credibility with the populace by using a clear legal mandate to guide their actions and the actions of its security forces.¹⁶

Rule of law also supports the line of operation to develop host nation security forces. This line of operation primarily involves the development of an army to defend against external threats and a police force to provide internal domestic security.¹⁷ As a police force is intended to enforce the laws of the government, it inherently must be based on rule of law. An ideal police force is a professional organization characterized by fair and unbiased law enforcement, absence of corruption, respect for rights and civil liberties, and knowledge and respect for legal processes.¹⁸ Galula also acknowledges the requirement for police forces that are professional and trusted by the population.¹⁹

Civil security operations – whether conducted by counterinsurgent forces or host nation security forces – conducted with a basis in rule of law increase the government’s chances of gaining popular support, or at a minimum not turning popular sentiment toward the insurgent

¹⁴ U. S. Army, *Counterinsurgency*, FM 3-24, 5-15 – 5-16.

¹⁵ U.S. Embassy-Kabul and U.S. Forces-Afghanistan, "United States Government Integrated Civilian-Military Campaign Plan for Support to Afghanistan," 8-9.

¹⁶ Komer, *The Malayan Emergency in Retrospect*, 34.

¹⁷ U. S. Army, *Counterinsurgency*, FM 3-24, 6-1.

¹⁸ *Ibid.*, 6-6 – 6-7.

¹⁹ Galula, *Counterinsurgency Warfare*, 87.

cause.²⁰ A 1972 RAND study of the Malayan Emergency noted that British and Malayan forces conducted security operations “within a recognized framework of rule of law and subject to frequent public debate”, reinforcing the popular acceptance of government actions.²¹ And in the current Afghanistan campaign the primary transformative objective of eleven is population security, which is supported by several primary objectives and efforts with elements of rule of law. These objectives include reduction of civilian casualties and mentorship and oversight of police forces, all intended to reduce popular motivation to actively or passively support the insurgent cause in lieu of the government. The rule of law element of security operations is also often manifested by security forces’ restraint of their use of force to moderate collateral damage and civilian casualties. A recent example of this is the July 2009 tactical directive issued by General McChrystal, then Commander of International Security Assistance Force in Afghanistan, and subsequently validated by General Petraeus in August 2010, intended to reduce unnecessary use of force to limit civilian casualties.²²

Several other lines of operations – support economic development and establish or restore essential services – are also reinforced by rule of law though to a lesser degree than the previously discussed lines of operation. Transparent financing and lack of corruption are necessary to foster general economic opportunity and sustainment of civil order is considered a basic essential service.²³ In the current Afghanistan campaign two of the eleven transformative effects are related to economic development: 1) creating sustainable jobs and 2) agricultural opportunity and market access. Several of the supporting priority objectives

²⁰ U. S. Army, *Counterinsurgency*, FM 3-24, 5-12.

²¹ Komer, *The Malayan Emergency in Retrospect*, 34.

²² Headquarters International Security Assistance Force, "General Petraeus Issues Updated Tactical Directive: Emphasizes Disciplined Use of Force."

²³ U. S. Army, *Counterinsurgency*, FM 3-24, 5-16 – 5-17.

for these desired effects are rule of law based: constricting black market commerce; reducing corruption in contracting of host nation works programs; and reducing reliance on trade of illicit crops.

So from this initial analysis, if rule of law standards are mutually supporting and reinforcing to the generic logical lines of operation of the COIN campaign, then it would follow that the counterinsurgent would want to adopt rule of law standards as early as possible in the campaign, establishing legal code, a judicial system with courts, judges, prosecutors and defenders, and a penal system with police and prisons. But if the counterinsurgent commander makes a deeper analysis of the security line of operation – specifically with respect to detention operations – he will find that a more nuanced approach is called for with respect to the timing of incorporation of rule of law standards.

SECURITY and DETAINEES

To further analyze the security line of operation, it is helpful to understand the relevance of security to a COIN campaign. Contrary to conventional state versus state conflict where one's goals may include destroying his opponent's military forces and seizing terrain to lessen his capability and will to fight, the counterinsurgent's principle goal is to capture the sympathies and support of the population.²⁴ But there is more to securing the support of the people than the simple act of physically securing a given area. If a counterinsurgent force moves into and clears insurgents from a given area, but does not win the support of the people, then his control of the area is only temporary in duration and the insurgent will regain control of the area upon departure of the counterinsurgent.²⁵ A counterinsurgent's

²⁴ Galula, *Counterinsurgency Warfare*, 4.

²⁵ U. S. Office of the CJCS, *Counterinsurgency Operations*, JP 3-24, III-1.

establishment of physical security in a given area or segment of the population is important then only as it contributes to obtaining the support of the population.

How then does the counterinsurgent translate the temporary security provided by its military and police forces into achieving popular support that provides the long term and lasting security? Galula categorizes a population into three groups over which the opposing insurgent and counterinsurgent forces are vying for control, “In any situation, whatever the cause, there will be an active minority for the cause, a neutral majority, and an active minority against the cause.”²⁶ Joint doctrine depicts this description of the populace in a little more detail (see figure 1).

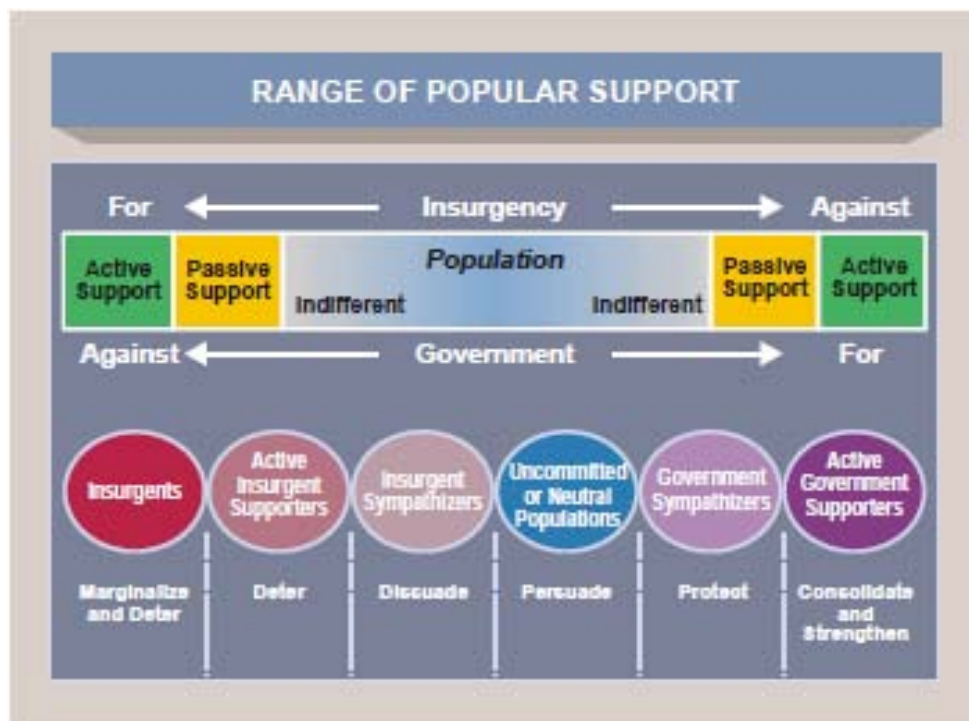


Figure 1: Range of Popular Support²⁷

The counterinsurgent secures popular support when he convinces the active minority for the cause (government supporters and sympathizers) to motivate a large majority of the

²⁶ Galula, *Counterinsurgency Warfare*, 53.

²⁷ U. S. Office of the CJCS, *Counterinsurgency Operations*, JP 3-24, III-2.

neutral segment of the population to side with his cause, or at least turn away from the cause of the insurgent. This battle is analogous to a tug-of-war in which the rope represents the population and the insurgent and counterinsurgent are both vying for its support. The people make the decision which side they will support based on who they perceive has the greatest chance of winning. The populace will not throw their lot in with an assessed loser – they want to ally themselves with the winning team.²⁸ To make his case the counterinsurgent must use force to demonstrate to the people his capability and will to win. Certainly the counterinsurgent must eventually combine these security operations with political, governmental, economic and social reforms (as depicted in joint doctrine with the generic logical lines of operation), but initially the counterinsurgent must use force to break the insurgent's grip on the people and gain popular support.

Both theory and doctrine discuss the need for the counterinsurgent to attack insurgent cells and remove their cancerous presence from among the population. Galula's first four of eight steps in his counterinsurgent strategy involve expelling insurgents from an area, preventing his return and then rooting out and destroying his political cells.²⁹ Joint and Army-Marine Corps doctrine discuss activities in the clear and hold phases of the clear-hold-build method that involve destroying or forcing the withdrawal of insurgent groups, attacking leadership and protecting the people from intimidation.³⁰

Pursuant to these theoretical and doctrinal approaches, and to achieve the greatest effect in attacking insurgent groups and their political cells, the counterinsurgent security forces must possess a wide latitude to capture and detain suspected insurgent militants and their sympathizers. The actions of some of these insurgents – particularly the sympathizers not

²⁸ Galula, *Counterinsurgency Warfare*, 55.

²⁹ Ibid., 75-89.

³⁰ U. S. Office of the CJCS, *Counterinsurgency Operations*, JP 3-24, X-2 – X-7.

involved in the conduct of actual violence – will not rise to the level of criminal prosecution under a peacetime rule of law construct. Yet the counterinsurgent needs to have the legal authorities to remove the full extent of the insurgent cancer from the populace to most effectively build the necessary popular confidence in his ability to win the struggle. This translates to the counterinsurgent detaining large numbers of suspected insurgent militants and sympathizers based on intelligence (versus evidence subjected to rules of collection) and without the need for judicial issued warrants. Then following initial detention, the counterinsurgent needs to also have the ability to keep the suspects incarcerated without benefit of due process or trial based on their threat to security of the population. One sees now how a counterinsurgent operating under the lower thresholds of law of war authorities will be more effective in his initial security efforts to gain popular support – and hence long term security - than if he is constrained to function under rule of law authorities.

This need to suspend aspects of rules of law with respect to detention of insurgent militants is supported by counterinsurgency theory and historic example. Galula refers to the necessity to suspend or abandon peacetime legal constraints in favor of ensuring a thorough purge of the insurgent's political apparatus and in turn providing maximum confidence to the active minority for the counterinsurgent's cause.³¹ During the Malayan Emergency beginning in 1948, the British-Malayan administration enacted in 1949 a series of emergency regulations that provided government counterinsurgent forces extraordinary powers and authorities. These powers included the ability to search, arrest and detain without a warrant and imposition of punishments for simple association with the insurgent Malayan Communist Party or possession of related documents. Government forces had the authority to arrest and detain personnel merely for suspicion of actively participating in or supporting

³¹ Galula, *Counterinsurgency Warfare*, 53,88.

the insurgent movement, though the government did implement reviews and appeals. Consequently the Malayan government imprisoned a large number of suspected militants – with a peak of 11,000 people in detention by the third year of the Emergency in 1951 and 34,000 cumulative detentions by the ninth year of the Emergency in 1957.³² More recently in Iraq, coalition and Government of Iraq counterinsurgent forces operated under a broad mandate sanctioned by a United Nations Security Council resolution —“take all necessary measures to contribute to the maintenance of security and stability in Iraq.”³³ This mandate in effect suspended rule of law requirements for arrests, facilitating a peak of over 26,000 suspected militants in detention by the fourth year of the insurgency in November of 2007, and over 100,000 total detainees over a six year period.³⁴ These high rates of targeted detentions in Malaya and Iraq, facilitated by lower legal thresholds, directly contributed to convincing minority segments of the population that the government forces had the will and capacity to win, and subsequently leading to a shifting in popular support to the counterinsurgent. The Iraq coalition’s sustained offensive operations against Sunni Al-Qaeda in Iraq militants in Anbar Province beginning in mid-2006 and continuing into early 2007 (which coincides with the detainee high-water mark) arguably was a contributing factor to key Sunni sheiks deciding to cooperate with Government of Iraq and coalition security forces and beginning the Awakening movement.³⁵

Using law of war standards to keep suspected insurgent militants incarcerated, the counterinsurgent can also exert influence on the active minority against the cause (the active insurgent supporter and insurgent sympathizer groups in Figure 1) to convince him that the

³² Komer, *The Malayan Emergency in Retrospect*, 35-37.

³³ United Nations. Security Council, "The Situation Between Iraq and Kuwait," S/Res/1546, para 10.

³⁴ Keyser, "Camp Bucca Closes," *Air Force Times*.

³⁵ Knights, "Shrewd Awakening - U.S. Aid for Sunni Militias Improves Iraqi Security," 33.

insurgent cannot win. A campaign of aggressive, persistent and targeted detentions of hard core insurgent leaders and operatives can weaken the resolve and morale of those less committed insurgents and sympathizers. But to be effective, insurgents must possess a feeling of certainty that active involvement or association with the insurgent cause will result in capture and long term detention. Only long term detention unfettered by trials and legal representation will provide the necessary example; the leniency associated with release of detained militants under rule of law protections will not provide any incentive to local insurgents to discontinue their struggle.³⁶

TIMING

Following this more thorough analysis of the relationship between rule of law, the security line of operation in a COIN campaign, and the impact on the decisive attitude of the favorable minority, the counterinsurgent leader finds it advantageous to delay the development of rule of law in his campaign. Delaying establishment of rule of law standards is preferred even if at the temporary expense of progress in other COIN lines of operation, as attempting any reforms along other lines of operation before breaking the insurgent's control of the population would be futile.³⁷

The counterinsurgent should seek to transition from law of war standards to rule of law standards only after elimination of the insurgent's political cells and establishment of a local governmental structure. History again supports this assertion. In the Malayan Emergency the government discontinued use of their emergency regulations and reverted to peacetime rules and laws only after they assessed a specified area as clear and secure.³⁸ In Iraq, the

³⁶ Author notes, Summary of Taliban insurgent attitudes based on detainee interrogations while serving in southern Afghanistan as a task force commander, 22 March – 8 July 2010.

³⁷ Galula, *Counterinsurgency Warfare*, 55, 84.

³⁸ Komer, *The Malayan Emergency in Retrospect*, 36.

coalition did not re-establish rule of law until the beginning of 2009 (the sixth year of the counterinsurgency) when the Government of Iraq and its security forces assumed full control and sovereignty under implementation of a Framework Agreement. Simultaneously the United Nations' resolution authorizing law of war powers expired and continued arrests and detentions were subsequently subject to requirements for warrants, Iraqi judicial review and trials. The detainee population in Iraq consequently decreased to ~21,000 (as of June 2008)³⁹ and then to 8,400 (as of September 2009).⁴⁰

The counterinsurgent leader's timing of when he decides to transition from law of war to rule of law now becomes a key consideration for the design of his COIN campaign.⁴¹ As discussed he should make the transition an event based decision (versus time based). If he makes the transition too early in his campaign, he risks a failure to fully eliminate insurgent cells from the population and influence the active minority due to the self-imposed high thresholds for detaining and incarcerating suspected insurgents. If he makes the transition too late, he risks alienating the population and losing legitimacy due to overextending his intrusion on civil liberties.

RISK

By suspending or deferring the implementation of rule of law, the counterinsurgent must strive to avoid two possible strategic pitfalls. He must first avoid over extending his use of power in the pursuit of security and elimination of the insurgent cells. A counterinsurgent's excessive or unmitigated restriction of civil liberties can just as easily dissuade the same favorable minority that he is trying to court, and threaten the same legitimacy he is trying to

³⁹ Stone, "Operational Update from Commander, TF-134 (Detainee Operations), MNF-I," Press Conference.

⁴⁰ Keyser, "Camp Bucca Closes," *Air Force Times*.

⁴¹ U. S. Office of the CJCS, *Joint Operations*, JP 3-0, IV-2 – IV-16.

establish.⁴² During France's counterinsurgency war in Algeria between 1954 to 1962, a large segment of the Algerian Muslim population was sympathetic to the French cause. But French indiscriminate reprisals against all Muslims in retaliation for insurgent National Liberation Army terror attacks caused this decisive segment of the population to turn their allegiance to the insurgent cause.⁴³ The counterinsurgent should avoid indiscriminate and widespread use of force and opt instead for specialized police conducting targeted detentions based on specific intelligence. The intelligence needed for these focused operations may be gained from the proper use of detainee interrogations versus criminal questioning where the detainee assumes legal protections - another example of the advantages gained from deferring implementation of rule of law standards.

Second, the counterinsurgent must ensure his actions do not violate ethical norms. As previously demonstrated, forgoing rule of law standards will result in a large number of detainees, increasing the opportunities for abuse. Large scale or systematic abuse of civil liberties outside of generally accepted ethical boundaries will compromise the legitimacy and international perception of the counterinsurgent force. The French decision to employ torture as part of their interrogations of Algerian suspected National Liberation Army militants or sympathizers destroyed their moral standing with both the Algerian and French populations, far outweighed any operational gains resulting from the intelligence and contributed to their eventual loss of legitimacy.⁴⁴ More recently the abuse and mistreatment of Iraqi prisoners by U. S. Army guards in the Abu Ghraib prison had a strategic negative impact to the coalition's

⁴² Galula, *Counterinsurgency Warfare*, 53.

⁴³ Francois, "Waging Counterinsurgency in Algeria," 63.

⁴⁴ Campbell, "French Algeria and British Northern Ireland: Legitimacy and the Rule of Law in Low-Intensity Conflict," 2.

mission and international support.⁴⁵ An argument to suspend rule of law to facilitate targeted military operations by well-trained military units or police forces against insurgent cells based on intelligence should not infer an absence of respect for human dignity and fair treatment. Making detentions under law of war thresholds and adherence to basic values and ethical treatment of detainees once in custody are not mutually exclusive.

CONCLUSION and RECOMMENDATIONS

As established by counterinsurgency theory and doctrine, establishment of rule of law standards and institutions is clearly a necessary and desired objective in a COIN campaign. An initial analysis of the relationship between rule of law and the generic logical lines of operation of a COIN campaign reveals advantages of seeking rule of law standards early in a campaign to reinforce reforms along all lines of operation. Though doctrine is silent on the question of timing and when to pursue rule of law within the COIN campaign, a further analysis demonstrates that the counterinsurgent leader should actually seek to delay development of rule of law. Specifically, development of rule of law policies and institutions should follow – versus precede – separation of the insurgent cells from the people and the subsequent shifting of popular support to the counterinsurgent and government forces. Prior to this transition the counterinsurgent should pursue the following policies:

- Conduct a high volume of operations to kill or capture insurgent leaders, operatives and sympathizers.
- Well trained forces or special police conduct these targeted operations based on specific and detailed intelligence.
- Detain these suspected militants based on reasonable intelligence that indicates their threat to the safety and security of the population or the stability of the government; do not impose requirements for warrants based on probable cause of specific criminal violations.

⁴⁵ U.S. Congress. Senate and House Armed Services Committees, "Testimony of Secretary of Defense Donald H. Rumsfeld on Abu Ghraib."

- Regularly review detainee status but continue incarceration of suspected militants and sympathizers based primarily on their threat to security; do not impose requirements for rules of evidence or legal representation of detainees into the review process.
- Develop a penal system with the capacity for a high number of detainees.
- Ensure counterinsurgent forces, police and prison personnel treat detainees with dignity and respect and in accordance with basic U. S. values from point of capture through incarceration.

Pursuit of these policies within a COIN campaign, assuming the remainder of the campaign is planned and executed successfully, will result in a greater likelihood of quickly eliminating the insurgent apparatus and separating him from the populace, influencing and gaining the support of the active minority population and securing the people. Once the counterinsurgent has established these necessary conditions he can pursue other reforms along the remaining campaign logical lines of operation based on the rule of law.

Finally, this analysis has cited the Afghanistan COIN campaign's stated goals for the inclusion of rule of law. But further analysis is needed to determine if this current campaign is pursuing the ideal timing of transition to rule of law standards and to further assess the campaign against the above recommendations, specifically regarding penal system capacity.

BIBLIOGRAPHY

- Campbell, James D. "French Algeria and British Northern Ireland: Legitimacy and the Rule of Law in Low-Intensity Conflict." *Military Review* 85, no. 2 (March/April 2005): 2-5.
- Francois, Philippe. "Waging Counterinsurgency in Algeria: A French Point of View." *Military Review* 88, no. 5 (September/October 2008): 56-67.
- Galula, David. *Counterinsurgency Warfare: Theory and Practice*. Westport: Praeger Security International, 2006.
- Headquarters International Security Assistance Force. "General Petraeus Issues Updated Tactical Directive: Emphasizes Disciplined Use of Force." *U.S. Fed News Service, Including U.S. State News*. 5 August 2010. <http://www.proquest.com/> (accessed 20 October 2010).
- Keyser, Jason. "Camp Bucca, Largest Lockup in Iraq, Closes." *Air Force Times*. 17 September 2009. http://www.airforcetimes.com/news/2009/09/ap_bucca_closes_091709/ (accessed October 2010).
- Knights, Michael. "Shrewd Awakening - U.S. Aid for Sunni Militias Improves Iraqi Security." *Jane's Intelligence Review* 21, no. 1 (January 2009): 32-36.
- Komer, R. W. *The Malayan Emergency in Retrospect: Organization of a Successful Counterinsurgency Effort*. Advanced Research Projects Agency, Santa Monica: The Rand Corporation, February 1972.
- Long, Austin. "The Anbar Awakening." *Survival* 50, no. 2 (April/May 2008): 67-94.
- Pincus, Walter. "U.S. Holds 18,000 Detainees in Iraq." *The Washington Post*. 15 April 2007. <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/14/AR2007041401554.html> (accessed October 2010).
- Stone, Douglas M. "Operational Update from Commander, Task Force - 134 (Detainee Operations), Multi-National Force - Iraq." Press Conference, Baghdad, 1 June 2008, http://www.usf-iraq.com/?option=com_content&task=view&id=20028&Itemid=131 (accessed October 2010).
- Thompson, Sir Robert. *Defeating Communist Insurgency: The Lessons of Malaya and Vietnam*. New York: Praeger, 1966.
- U. S. Army. *Counterinsurgency*. Field Manual (FM) 3-24. Washington, DC: Headquarters Department of the Army, 15 December 2006.

- U. S. Office of the Chairman of the Joint Chiefs of Staff. *Counterinsurgency Operations*. Joint Publication (JP) 3-24. Washington, DC: CJCS, 5 October 2009.
- . *Joint Operation Planning*. Joint Publication (JP) 5-0. Washington, DC: CJCS, 26 December 2006.
- . *Joint Operations*. Joint Publication (JP) 3-0 with Change 2. Washington, DC: CJCS, 22 March 2010.
- U.S. Congress. Senate and House Armed Services Committees. "Testimony of Secretary of Defense Donald H. Rumsfeld on Abu Ghraib." 7 May 2004, <http://www.defense.gov/speeches/speech.aspx?speechid=118> (accessed 21 October 2010).
- U.S. Embassy-Kabul and U.S. Forces-Afghanistan. "United States Government Integrated Civilian-Military Campaign Plan for Support to Afghanistan." Kabul, 10 August 2009.
- United Nations. Security Council. "The Situation Between Iraq and Kuwait." S/Res/1546, 2004, http://www.un.org/Docs/sc/unsc_resolutions04.html (accessed October 2010).